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No. _____

In The

Supreme Court of the United States

October Term, 1994

DARNELL GARCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit Court of Appeals's decision in *United States v. Garcia*, 37 F.3d 1359 (1994), violate the Due Process Clause of the Fifth Amendment as interpreted in *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), and its progeny, by creating a mandatory presumption concerning an element of a money laundering offense, 18 U.S.C. §§ 1956(a)(1) and (a)(2), that any funds withdrawn from a bank account containing both drug-tainted money and money from a non-drug source are – beyond a reasonable doubt – "in fact" drug proceeds.

LIST OF PARTIES

Petitioner: Darnell Garcia

Respondent: United States of America

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PETITION FOR WRIT OF CERTIORARI

Darnell Garcia hereby petitions for a writ of certiorari and requests that this Court grant the petition and vacate the judgment of the Ninth Circuit of the court of appeals with instructions to grant a new trial.

OPINIONS BELOW

The opinion of the court of appeals for the Ninth Circuit in *United States v. Darnell Garcia* is reported at 37 F.3d 1359 (1994). *See* Appendix at A-1. The lower court's judgment, Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc, filed on October 20, 1994, and

the unpublished order of the court of appeals for the Ninth Circuit denying the Petition for Rehearing and rejecting the Suggestion for Rehearing En Banc, issued December 5, 1994, are reproduced at A-30, A-31, and A-29 of the Appendix, respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals for the Ninth Circuit entered its judgment on November 22, 1994. The Ninth Circuit denied the Petition for Rehearing and Suggestion for Rehearing En Banc on December 5, 1994. A-30, A-29.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition concerns the Due Process Clause of the Fifth Amendment's prohibition against conviction of a defendant except upon proof beyond a reasonable doubt of every element of the crime with which he is charged.

This Petition also involves 18 U.S.C. §§ 1956(a)(1) and (a)(2), the text of which is set forth at A-47-48 of the Appendix.

STATEMENT OF THE CASE

After a fifty-two day trial, a jury convicted former Drug Enforcement Administration ("DEA") Agent

Darnell Garcia on five counts of a six count indictment in the United States District Court for the Central District of California before the Honorable Terry J. Hatter, Jr. Counts 4 and 5 of the Amended Third Superseding Indictment charged Mr. Garcia with money laundering in violation of 18 U.S.C. §§ 1956(a)(1) and (a)(2), in connection with the transfer of $420,000 from a bank account in Switzerland to an account in the United States.[1] The critical element of the money laundering offenses requires proof beyond a reasonable doubt that the transferred funds "in fact involve[d]" proceeds derived from specified illegal activities. Tracking this language, the indictment charged and the government contended that the $420,000 "in fact involve[d]" drug proceeds. Evidence was presented, however, that the bank account contained more than $420,000 of non-drug proceeds at the time of the transfer. Given – on the one hand, the fungibility of money – and on the other, the element under the money laundering statutes requiring proof beyond a reasonable doubt that the transferred funds "in fact involve[d]" drug proceeds,

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[1] The Amended Third Superseding Indictment also charged Mr. Garcia with conspiracy to distribute cocaine and heroin and/or to use the telephone in connection with drug offenses in violation of 21 U.S.C. §§ 846, 841(a)(1), and 843(b) (Count 1); theft of government property in violation of 18 U.S.C. § 641 (Count 2); possession with the intent to distribute one kilogram of heroin in violation of 21 U.S.C. § 841(a)(1) (Count 3); and giving notice of an intended government search and seizure in violation of 18 U.S.C. § 2232 (Count 6). The trial court granted Mr. Garcia's motion under Rule 29 of the Federal Rules of Criminal Procedure, and dismissed Count 6. The court of appeals limited the conspiracy charge to the use of the telephone in connection with a drug offense.

both the prosecution and the defense recognized the necessity of a jury instruction which specifically dealt with a withdrawal from a bank account allegedly containing both non-drug money and "tainted" proceeds. CR 518; CR 520; ER 312, 318.[2] Yet, the trial court rejected both instructions and indicated each side could argue its position to the jury. CR 522; RT 5239; ER 331.

On appeal, the Ninth Circuit, in upholding the district court's decision not to instruct the jury on commingled bank accounts, established an unconstitutional mandatory presumption in prosecutions under 18 U.S.C. § 1956. In this question of first impression under the money laundering statutes, the appeals court decided that so long as any drug-tainted money is in the bank account at the time of the transfer, this tainted money is presumed to have been included with the money actually transferred. As a result, the government's burden of proof on an element of the offense is satisfied by use of a presumption.

A. The Proceedings.

At trial, the government argued that Mr. Garcia and his former DEA colleagues and co-defendants John Jackson ("Jackson") and Wayne Countryman ("Countryman"), engaged in a conspiracy to steal drugs and money

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[2] "CR" refers to the Clerk's Record on Appeal. "RT" refers to the Reporter's Transcript. Most of the trial proceedings were transcribed by one court reporter who numbered the pages consecutively. Transcripts prepared by other reporters are identified by date and page number (e.g., RT 11/15/90 20). "ER" refers to defendant's excerpt of record.

from the DEA and from suspected drug dealers, buy and sell cocaine and heroin, and launder the proceeds in foreign bank accounts. On November 21, 1988, the government filed a one count criminal complaint against Mr. Garcia, Jackson and Countryman, charging them with conspiring to evade income taxes. CR 1. Jackson and Countryman were arrested on November 22, 1988 on the charge alleged in the complaint. RT 1129, 4334. Mr. Garcia became a fugitive on that date, RT 4343, and fled the United States in January 1989, fearing he would be killed if arrested by the DEA.[3] RT 4348; ER 83. While Mr. Garcia was a fugitive, the government filed a Third Superseding Indictment which charged defendants with possession and distribution of narcotics, tax and currency reporting violations, and conspiracy to steal drugs and money from the DEA. CR 163.

Mr. Garcia was extradited from Luxembourg to stand trial on six counts contained in the Third Superseding Indictment. He made his first appearance in district court on February 26, 1990, and was arraigned on March 19, 1990. Mr. Garcia pleaded not guilty to three counts, and challenged the jurisdiction of the court to try him on three others. CR 245. On these counts, the court entered a

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[3] Mr. Garcia had previously sued the DEA for race and national origin discrimination and had obtained an injunction preventing the DEA from terminating his employment. *See Garcia v. Lawn*, 805 F.2d 1400 (9th Cir. 1986). Eventually, Mr. Garcia received back pay and attorneys' fees, and adverse material was expunged from his employment records. At his criminal trial, the defense presented evidence showing that some DEA officials intended to retaliate against Mr. Garcia as a result of his lawsuit.

plea of not guilty. The Third Superseding Indictment was modified and the case proceeded to trial on the Amended Third Superseding Indictment.

B. The Government's Charges.

In Counts 2 and 3 of the Indictment, the government charged Mr. Garcia (and co-defendant Jackson) with the theft and sale of a kilogram of heroin from a DEA evidence vault on October 5, 1984. The other counts contained the money laundering charges and alleged a four-year conspiracy, involving Mr. Garcia, Jackson, Countryman, and two other defendants, Sherman Lair and Barbara Jackson, to steal drugs and drug proceeds from the DEA, and sell the stolen drugs, either directly or through unindicted co-conspirator Mahlon Steward ("Steward") or co-defendant Sherman Lair ("Lair"). Appellee's Brief ("AB") at 6-10; Appellant's Opening Brief ("AOB") at 13-18. Co-defendants Jackson, Countryman, and Lair testified against Mr. Garcia pursuant to cooperation provisions in their respective plea agreements. RT 11/29/90 13, 12/14/90 7; RT 893. Unindicted co-conspirators Steward and Anthony Goodman, the brother-in-law of co-defendant Lair, also testified against Mr. Garcia under cooperation agreements.[4]

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[4] Under the plea agreements, Jackson and Countryman both pleaded guilty to conspiracy charges. The agreements specified a sentence of 15 years for Jackson and 10 years for Countryman. After their testimony against Mr. Garcia, the district court sentenced Jackson to 10 years in prison while Countryman received a five-year sentence. Mr. Garcia received a consecutive sentence on the five counts of 80 years.

C. Mr. Garcia's Involvement in Jewelry Smuggling and Under-Karating.

The government argued that Mr. Garcia deposited the proceeds of narcotics transactions into Swiss bank accounts. At trial, however, Mr. Garcia presented substantial evidence to counter the government's claim. He showed that from 1982 through the time he was extradited from Luxembourg, he, along with Piero Saltarelli, the owner of a gold jewelry importing company named Oro Aurora, smuggled under-karated jewelry into the United States, and deposited the smuggling profits into his foreign bank accounts. AOB at 7-13; AB at 12-14.

Mr. Garcia first met Saltarelli in 1978, RT 3621, and began smuggling gold from Italy for Saltarelli in 1982. RT 3617-18. On May 7, June 13 and 26, 1982, for example, Mr. Garcia helped smuggle approximately 220 kilograms of gold chain, for which he received $45,000-$55,000. RT 3636-47. In November 1983, Mr. Garcia learned that Oro Aurora and Saltarelli were engaging in under-karating – the practice of selling jewelry labelled as containing more pure gold than it actually does. Saltarelli agreed that Mr. Garcia would share in the profits from this operation as well. Exh. EB; RT 3666-78, 3683. Mr. Garcia's personal calendars[5] reflect that on 26 separate occasions during

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[5] Mr. Garcia's calendars were admitted into evidence as exhibits DL, DP, DS, DW, DX, DY, 134H, and EE. These calendars are the only surviving written record of Mr. Garcia's activity in the jewelry business since records maintained by Saltarelli and Oro Aurora were either destroyed or never requested by the government – as it could have done under various international treaties. *See* AOB, section IV.D.

1984, 1985, 1986, and 1987, he smuggled a total of 5,400 kilograms of gold into the country, and shared in the profits from under-karating and from the savings in avoiding customs duties.

The evidence Mr. Garcia presented at trial showed his extensive connections to Oro Aurora. Frequently, Oro Aurora would pay for and arrange Mr. Garcia's trips to Italy. RT 3035; Exh. EC, EX; RT 12/19/90 53, 12/20/90 44, 12/20/90 65. Mr. Garcia would also purchase cashier's checks in the United States for Saltarelli, his partner Augusto Ticconi, and Oro Aurora, and deliver the cashier's checks and cash for deposit in Switzerland. RT 3651, 3692, 3727-28, 3799, 3782-84, 3789-90. Indeed, it was Saltarelli who introduced Mr. Garcia to bank officials at Swiss Bank Corporation ("SBC"), where he opened an account in November 1983. RT 3658-60. Mr. Garcia argued the proceeds in this account, as of the May 1987 transfer which was the basis for Counts 4 and 5, were derived from his involvement with Saltarelli and Oro Aurora.[6]

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[6] For example, Mr. Garcia's calendar entries reflect profits from gold smuggling of $395,000 at the end of 1984, RT 3730-31, $459,905 at the end of 1985, RT 3766-67, and $460,000 at the end of 1987, RT 3840. Also, an independent appraiser of fine art and jewelry, Stuart Salisbury, testified at trial that Mr. Garcia would have earned $2,347,544.35 as profit for smuggling in 5,400 kilograms of under-karated gold. RT 4784-803; Exh. ED, ER, ES; ER 539. Through May 21, 1987, the total amount of gold proceeds would have been $2,176,637.06, Exh. ES; ER 541, quite close to the actual amount in the account on the transfer date. *See* AOB at 11-12.

D. Counts 4 and 5 of the Indictment.

On May 21, 1987, $420,000 was wire transferred from Mr. Garcia's SBC account in Mendrisio, Switzerland to his account at Santa Monica Bank in Santa Monica, California. On the day of the wire transfer, the account contained approximately $1,738,208.20. Thereafter, Mr. Garcia wrote a check in the amount of $556,000 on his Santa Monica Bank account and deposited it into escrow for the purchase of a home in Palos Verdes, California. The Government thus alleged two separate violations of 18 U.S.C. § 1956 – one under (a)(2)(B)(i) for the transfer of alleged drug proceeds to the United States, and one under (a)(1)(B)(i) for the alleged use of drug proceeds to conduct a financial transaction. The same $420,000 was the basis for both violations.

REASONS FOR GRANTING THE PETITION

This Court declared in *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." This "bedrock, 'axiomatic and elementary' [constitutional] principle," *id.* at 363, was forcefully pronounced again and again in *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975), *Patterson v. New York*, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977), *Sandstrom v. Montana*, 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979), and *Francis v. Franklin*, 471 U.S. 307, 85 L. Ed. 2d 344, 105 S. Ct. 1965 (1985).

An element of the crime with which Mr. Garcia was charged – and thus which the prosecution had to prove beyond a reasonable doubt – was that the "financial transaction . . . in fact involve[d] the proceeds of specified unlawful activity," 18 U.S.C. § 1956(a)(1), in this case, illegal drug thefts and sales. Yet the Ninth Circuit held that the prosecution need not prove this element since any amount of money withdrawn from a commingled account is presumed tainted. "The presence of some tainted funds in the commingled account is sufficient to taint the $420,000 wired from [Mr. Garcia's] Swiss account to Santa Monica to buy the house." 37 F.3d at 1365-66. Though as of yet, the Ninth Circuit is the only court to address this question of first impression under the statute, this issue will invariably arise again under prosecutions involving 18 U.S.C. § 1956. It is imperative, therefore, that this Court provide guidance to the lower courts.

In addition, the Ninth Circuit's decision creating a presumption directly conflicts with rulings in the Fifth Circuit under 18 U.S.C. § 2314 insofar as the commingling of funds in a single bank account is concerned. In a number of cases under the successor of the Interstate Transportation of Stolen Property Act where stolen money is the property involved in the offense, the Fifth Circuit has consistently held that the prosecution must actually prove beyond a reasonable doubt that the money transferred from a commingled bank account includes stolen funds. Unless the Court grants Mr. Garcia's petition to resolve the conflict, a constitutionally infirm presumption may be used in one jurisdiction to convict a

defendant when funds are transferred from a commingled account, whereas in another, the prosecution must actually convince the jury that tainted funds were in fact transferred. *See infra* at 15-17.

I. THE DISTRICT COURT ERRED IN RULING THAT A COMMINGLING INSTRUCTION WAS UNNECESSARY.

At the time of trial, no federal court had yet addressed how the government must satisfy its burden of proof in a prosecution for violation of section 1956(a) if the amount of non-drug funds in a commingled account is at least equal to or greater than the amount of money the indictment contends was illegally withdrawn from the account. This crucial issue was hotly contested at trial, and each side – believing the jury required guidance on this element of the offense – submitted its own proposed jury instructions. CR 518, 520; ER 312, 318. The prosecution maintained it need only show there was at least $420,000 of alleged drug money in the account on the day of the transfer. RT 5237. Mr. Garcia argued that if the account from which the $420,000 was transferred contained more than $420,000 in non-drug proceeds, the jury must acquit.[7] RT 5239.

The prosecution's proposed instruction was based on a Second Circuit decision under a civil forfeiture statute,

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[7] The same principle was adopted by the Fifth Circuit in *United States v. Poole*, 557 F.2d 531 (5th Cir. 1977), in connection with the transfer of illegal proceeds under 18 U.S.C. § 2314. *See infra* at 17.

21 U.S.C. § 881(a)(6).[8] *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2nd Cir. 1986). In *Banco Cafetero*, the government sought to forfeit approximately $3 million in five bank accounts as "proceeds traceable" to narcotics transactions. Appellants in that case contended the amounts in the accounts did not constitute "proceeds traceable" to narcotics exchanges. Since the legislative history offered no guidance on the question of how to determine whether a traceable connection existed between the proceeds from a narcotics transaction and a credit balance of an active and commingled account, *id.* at 1159, the Second Circuit developed three accounting principles: "drugs-in, first-out," "drugs-in, last-out," and the "averaging" rule.

Under the "drugs-in, first-out" approach, if $100 of drug proceeds is deposited into an account containing $150 of non-drug money, and a check for $50 is written, the $50 is deemed to come from the $100 of drug money rather than from the $150 of untainted funds. Under the alternative "drugs-in, last-out" approach, the $50 is deemed to come from the $150 of "clean" money. Using

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[8] Section 881(a)(6) provides in pertinent part:

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

. . .

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title. . . .

the third approach, the "averaging" rule, "traceable proceeds" consists of the pro rata share of any withdrawal from the account – this share calculated by the ratio of drug money to the account balance after the drug money is deposited in the account. *Banco Cafetero*, at 1159. The prosecution patterned its proposed jury instruction on the "drugs-in, first-out" accounting convention articulated by the Second Circuit in *Banco Cafetero*.[9]

Mr. Garcia's proposed instruction told the jury the government must prove beyond a reasonable doubt that the $420,000 consisted of drug proceeds. The defense contended the *Banco Cafetero* rule could not possibly apply to criminal proceedings because the burden of proof in a civil forfeiture case differs radically from the burden of proof which must be satisfied in a criminal

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[9] The government's proposed instruction read:

> With respect to the money laundering charges in Counts Four and Five of the Amended Third Superseding Indictment, you are instructed that where proceeds from a drug sale are commingled in an account with other funds, and withdrawals are subsequently made, any one withdrawal from the account, up to the amount of the drug deposits, may be considered drug proceeds.
>
> The government must prove beyond a reasonable doubt that at the time of the transfer of $420,000 referred to in Counts Four and Five of the Amended Third Superseding Indictment, Darnell Garcia's account at Swiss Bank Corporation contained at least $420,000 in proceeds from the felonious buying, selling, or dealing of narcotic or other dangerous drugs. The government is not required to prove that the $420,000 came from a particular drug sale.

CR 518; ER 312.

case. More importantly, the defense argued the *Banco Cafetero* rule created a presumption which improperly relieved the government of its burden of proof on a critical element of the offenses. The defense's proposed jury instruction stated:

> With respect to the money laundering charges in Counts Four and Five of the Amended Third Superseding Indictment, you are instructed that the government must prove, beyond a reasonable doubt, that the $420,000 referred to in those Counts were, in fact, the proceeds of the felonious buying, selling or dealing of narcotics or other dangerous drugs. If you are unable to determine whether the specific $420,000 constituted the proceeds of the felonious buying, selling or dealing of narcotics or other dangerous drugs, you must find Darnell Garcia not guilty of Counts Four and Five of the Amended Third Superseding Indictment.

CR 520; ER 318.

The district court refused to give either proposed instruction, and in effect told the parties to argue their interpretations of section 1956 to the jury. The instructions the court ultimately provided the jury were the pattern Ninth Circuit instructions which neither address the commingling issue, nor instruct the jury that the transferred funds had to "in fact involve[ ]" drug proceeds.[10]

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[10] The district court's instruction for Count 4 read:

> [T]he government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant caused money to be transported from a place in the United States to or through a place outside the United States or to a place in the

II. THE NINTH CIRCUIT'S JUDGMENT CREATED A MANDATORY PRESUMPTION VIOLATIVE OF THE DUE PROCESS CLAUSE AND OF THIS COURT'S LINE OF DECISIONS.

A. The Ninth Circuit Rejected the Approaches Used by Courts in Both the Civil Forfeiture and Criminal Arenas to Deal with the Question of How to Treat Funds Withdrawn from a Commingled Account.

On appeal, the government again argued the applicability of *Banco Cafetero*'s "drugs-in, first-out" approach. *See* AB at 19. In support of his instruction, Mr. Garcia

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United States from or through a place outside the United States.

Second, the defendant knew that the money represented the proceeds of the felonious buying, selling or dealing of narcotic or other dangerous drugs.

Third, the defendant knew the transportation was designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of drug proceeds.

The court's instruction on Count 5 stated as follows:

[T]he government must prove each of the following elements beyond a reasonable doubt:

First, the defendant conducted a financial transaction involving property that represented the proceeds of the felonious buying, selling or dealing of narcotic or other dangerous drugs.

Second, the defendant knew that the property represented the proceeds of the felonious buying, selling or dealing of narcotic or other dangerous drugs.

Third, the defendant knew the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of drug proceeds.

directed the appeals court to decisions under 18 U.S.C. § 2314,[11] where courts have addressed precisely the same issue posed by section 1956 – the prosecution's burden of showing beyond a reasonable doubt that withdrawn funds from a commingled account consist of tainted money. These decisions under section 2314, Mr. Garcia argued, were far more instructive than *Banco Cafetero*'s analysis in the civil forfeiture arena, since they recognized the government's burden of proof on the commingling issue in a criminal context. *See* AOB at 27-30.

For example, in *United States v. Heath*, 970 F.2d 1397 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 23 L. Ed. 2d 265, 113 S. Ct. 1643 (1993), defendants maintained an account containing $799,281.55 in "clean" money and $6,053,204.93 in allegedly stolen funds. By the date of the first transfer cited in the indictment, defendants had reduced the account balance to $3,988,519. They subsequently transferred $2,155,508 from this amount to a New York broker. Since more than the total amount of "clean" money was transferred, the Fifth Circuit held that the amount of untainted funds in the account could not cover all of the transfers to New York – even assuming none of

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[11] Section 2314 prohibits the interstate transportation of goods and money acquired by fraud, and provides in pertinent part: "Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

the "clean" funds were withdrawn before the first transfer. *Id.* at 1403. Thus, the Fifth Circuit held the government proved beyond a reasonable doubt that stolen funds were transferred, because the aggregate amount withdrawn exceeded the amount of untainted money available in the account. *Id.* at 1404.

Heath followed other Fifth Circuit decisions, all of which focused on whether there was sufficient untainted money in the commingled account at the time of the illegal transfer in order to determine if, at the least, some "illegal" funds were included in the transfer. *See, e.g., United States v. Lennon*, 814 F.2d 185, 188-89 (5th Cir.), *cert. denied*, 484 U.S. 928, 98 L. Ed. 2d 254, 108 S. Ct. 295 (1987)(as long as each check contained at least $5,000 [§ 2314's jurisdictional requirement] in fraudulently obtained funds, irrelevant that checks drawn on commingled account); *United States v. Levy*, 579 F.2d 1332, 1336 (5th Cir. 1978), *cert. denied*, 440 U.S. 920, 59 L. Ed. 2d 471, 99 S. Ct. 1243 (1979)(conviction upheld where either of checks in the amounts of $45,000 and $55,000 drawn on commingled account containing $27,000 in untainted funds and $160,324 in fraudulently obtained money could have consisted of at most $27,000 in legitimate money); *United States v. Poole*, 557 F.2d 531, 535-36 (5th Cir. 1977)(no conviction because sufficient untainted funds in commingled account to cover check).

Without analysis or explanation, the Ninth Circuit brushed off the Fifth Circuit's reasoning in the section 2314 cases as "inapposite." 37 F.3d at 1365. It also rejected the accounting principles identified in *Banco Cafetero*. *Id.* Instead, the Ninth Circuit simply concluded a jury instruction on commingled accounts was "unnecessary."

Id. The Ninth Circuit was wrong: an instruction was **required** to prevent the jury from applying precisely the same unconstitutional mandatory presumption it created.

B. The Ninth Circuit Impermissibly Created an Unconstitutional Mandatory Presumption.

The Ninth Circuit correctly stated that "whether there were tainted funds in a commingled account is the issue of fact for the jury to decide." 37 F.3d at 1365. It also properly identified the government's burden as "the burden to prove that the $420,000 at issue had been derived from drug trafficking." *Id.* at 1364. The Ninth Circuit failed, however, to recognize the crucial need to link the evidence that an account contains commingled funds, and the requirement that the jury conclude beyond a reasonable doubt that the withdrawn funds "in fact involve[d]" the proceeds of narcotics transactions. Instead, the appeals court held that "[t]he presence of some tainted funds in the commingled account is sufficient to taint the $420,000 wired from [Mr. Garcia's] Swiss account to Santa Monica to buy the house," *id.* at 1365-66 – thereby seizing from the jury its responsibility to determine beyond a reasonable doubt whether the $420,000 was "in fact" drug money. Moreover, the Ninth Circuit never defined "some." Thus, under its logic, if $10 of tainted funds were deposited into an account containing $200,000 of legitimate money, any amount withdrawn would be deemed tainted and a violation of section 1956.

"A mandatory presumption," this Court declared in *Francis v. Franklin*, 471 U.S. 307, 353, 85 L. Ed. 2d 344, 105 S. Ct. 1965 (1985), "instructs the jury that it must infer the

presumed fact if the State proves certain predicate facts." In *Francis*, this Court decided two challenged sentences of a jury instruction on the issue of intent created such a mandatory presumption. "The portion of the jury charge challenged in this case directs the jury to presume an essential element of the offense – intent to kill – upon proof of other elements of the offense – the act of slaying another." *Id.* at 355. Similarly, the Ninth Circuit's holding in *Garcia* directs the jury to presume an essential element of the offense – that the $420,000 "in fact involve[d]" the proceeds of narcotics trafficking – upon proof of a predicate fact – the money was transferred from a commingled account.

This Court established in *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." The Court emphatically affirmed this basic constitutional axiom in a number of decisions over the next fifteen years: *Patterson v. New York*, 432 U.S. 197, 215, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977)(The "shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause."); *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975)(the Due Process Clause requires the prosecution – not the defense – to prove beyond a reasonable doubt the absence of heat of passion on sudden provocation when the issue is presented to the jury); *Sandstrom v. Montana*, 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979)(jury instruction that "[t]he law presumes

that a person intends the ordinary consequences of his voluntary acts" prohibited under Due Process Clause as shifting to the defense the burden of proof on the issue of purpose or knowledge); and *Francis v. Franklin, supra.* As Justice Scalia recently wrote for this Court in *Sullivan v. Louisiana,* ___ U.S. ___, 124 L. Ed. 2d 182, 188, 113 S. Ct. 2078, 2080 (1993):

> What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged . . . and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements. . . .

(Citations omitted.)

The Ninth Circuit decision sanctioned the district court's refusal to instruct the jury concerning a commingled account on the completely improper basis that the jury could **presume** an element of the offense beyond a reasonable doubt. The holding that a withdrawal of any amount from a commingled account is presumed to consist of tainted funds clearly violates the Due Process Clause and contravenes the authority of this Court.

III. THE IMPORTANCE OF THIS QUESTION OF FIRST IMPRESSION.

The legislative history of the Money. Laundering Control Act of 1986 is sparse. *See United States v. Blackman,* 904 F.2d 1250, 1257 (8th Cir. 1990)("Unfortunately neither the statute nor its legislative history precisely addresses the requirement that the money involved in the

transaction represent proceeds from drug trafficking."). No committee reports were submitted to Congress. *See* 1986 U.S. Code Cong. & Adm. News 5393. The House and Senate reports submitted discuss the purpose behind sections 1956 and 1957, but do not address the issue posited here: how to treat funds withdrawn from a commingled account.

Indeed, no reported decision of an appellate court has dealt with the "in fact involves the proceeds" requirement in connection with a withdrawal from a commingled account under the money laundering statutes. Although, as the Ninth Circuit stated in its opinion, other circuits besides the Ninth have "address[ed] the 'proceeds' requirement of section 1956. . . . ," 37 F.3d at 1365, citing *United States v. Blackman*, 904 F.2d 1250 (8th Cir. 1990), *United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992), and *United States v. Jackson*, 983 F.2d 757 (7th Cir. 1993), these decisions discuss aspects of the proceeds requirement different from what is at issue here.

In *Blackman*, the Eighth Circuit held the government need not *trace* the proceeds to a particular sale in a section 1956 prosecution. 904 F.2d at 1257. The Tenth Circuit decided in *Johnson* that the government did not need to "prove that no 'untainted' funds were deposited along with the unlawful proceeds." 971 F.2d at 570. And in *Jackson*, which was decided after the trial in this case, the Seventh Circuit concluded that a transaction "involving" the proceeds of narcotics trafficking need not consist **entirely** of "tainted" funds. 983 F.2d at 765. By contrast, Mr. Garcia never argued the government had to trace deposited money to a particular drug transaction (*Blackman*). Nor did he maintain the prosecution had to fulfill

its burden by showing no legitimate funds were deposited along with the tainted money (*Johnson*). Neither party raised the *Jackson* issue at trial concerning whether the statute requires proof that **all** of the transferred proceeds involved drugs. The indictment on which the government proceeded, however, alleged that **all** of the money was drug tainted and the government's proposed jury instruction, like Mr. Garcia's, concerned **all** of the money. Regardless, *Jackson* does not reach the issue presented in this case. Whether the $420,000 had to consist entirely or only partially of "tainted" funds, the jury remained unguided regarding how to determine if **any** drug funds were, in fact, transferred from Switzerland to Santa Monica.

It may be that the due process requirement that every element of a crime charged be proven beyond a reasonable doubt presents a difficult hurdle for successful prosecutions under 18 U.S.C. § 1956 when a commingled account is present. The difficulty, however, results from the "in fact involves" element of the crimes, which Congress can remedy if it determines to do so. In the meantime, the establishment of a mandatory presumption in a criminal statute cannot stand.

Finally, the conflict between the Ninth Circuit's decision under 18 U.S.C. § 1956 and the Fifth Circuit's decisions under 18 U.S.C. § 2314 requires prompt attention. The decisions under section 2314 properly apply the government's burden of proof when funds are transferred from a single commingled account. These decisions should compel rejection of the Ninth Circuit's mandatory presumption approach to transfers of money from a bank account containing commingled funds.

CONCLUSION

Since the Ninth Circuit's judgment creates a mandatory presumption violative of the Due Process Clause and this Court's decisions, the petition for writ of certiorari should be granted, and the judgment below should be vacated with instructions to grant a new trial.

Dated: March 6, 1995

Respectfully submitted,

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Darnell GARCIA, Defendant-Appellant.

No. 91-50642.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 7, 1993.

Decided Oct. 4, 1994.

Defendant, a former special agent of the Drug Enforcement Administration (DEA), was convicted of narcotics conspiracy, theft of government property, possession with intent to distribute heroin, and money laundering, before the United States District Court for the Central District of California, Terry J. Hatter, Jr., J., and defe dant appealed. The Court of Appeals, Hug, Circuit Judge, held that: (1) no jury instruction as to commingling of funds was necessary; (2) trial court did not abuse its discretion in refusing to instruct jury on failure of Government to preserve evidence; (3) evidence that defendant brought successful discrimination suit against DEA was inadmissible; (4) trial court's erroneous "correction" of ambiguous sentence violated double jeopardy clause; and (5) court erred in sentencing defendant to longest possible conspiracy sentence, when jury was not provided special verdict form to indicate the object of defendant's conspiracy.

Affirmed in part and remanded.

Gail Ivens, Pasadena, CA, for defendant-appellant.

Stefan D. Stein, Asst. U.S. Atty., Los Angeles, CA, for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before: HUG, SCHROEDER, and FERGUSON, Circuit Judges.

HUG, Circuit Judge:

I.

OVERVIEW

Darnell Garcia, a former Special Agent of the Drug Enforcement Administration ("DEA") appeals his conviction and sentence in the district court following a five-month jury trial for violating 21 U.S.C. § 846, narcotics conspiracy; 18 U.S.C. § 641, theft of government property; 21 U.S.C. § 841(a)(1), possession with intent to distribute heroin; and 18 U.S.C. §§ 1956(a)(1) and (a)(2) money laundering. His pre-guidelines sentence totaled 80 years. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

II.

FACTS

On November 21, 1988, Garcia and fellow DEA agents John Jackson and Wayne Countryman were charged in a criminal complaint with one count of conspiracy to evade federal income taxes. On November 22,

Jackson and Countryman were arrested. Garcia evaded arrest, and in January 1989, fled the United States.

While Garcia was a fugitive, federal grand juries issued two superseding indictments adding two additional defendants and additional charges for a total of 42 counts. Garcia was named in 26 of the counts. The superseding indictments charged the defendants with a wide-ranging conspiracy to steal drugs and money from the DEA, possession and distribution of narcotics, and multiple tax and currency reporting violations.

Garcia was arrested on July 3, 1989, at a travel agency in the Grand Duchy of Luxembourg. On February 15, 1990, pursuant to an extradition treaty, the Luxembourg Minister of Justice issued a decree ordering Garcia's extradition to the United States on 6 of the 26 counts alleged against Garcia in the third superseding indictment.[1]

On February 26, 1990, Garcia made his first appearance in the United States District Court for the Central District of California, Judge Terry J. Hatter, Jr., presiding. He was arraigned on the six-count indictment and charged with: count 1, conspiracy to possess with intent to distribute cocaine and heroin and use of communication facilities to facilitate the commission of drug offenses in violation of 21 U.S.C. §§ 841(a)(1), 843(b), and 846;

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[1] The 20 other charges brought against Garcia are not considered crimes in Luxembourg. Thus, under the doctrine of dual criminality, Garcia could not be extradited or tried on those 20 charges. *See United States v. Van Cauwenberghe*, 827 F.2d 424, 428 (9th Cir.1987), *cert. denied*, 484 U.S. 1042, 108 S.Ct. 773, 98 L.Ed.2d 859 (1988).

count 2, theft of one kilogram of heroin, which was government property, in violation of 18 U.S.C. § 641; count 3, possession with intent to distribute heroin in violation of 21 U.S.C. § 841(a); counts 4 and 5, transferring proceeds of narcotics trafficking in violation of 18 U.S.C. §§ 1956(a)(2) and 1956(a)(1); and count 6, giving notice of an intended government search and seizure in violation of 18 U.S.C. § 2232.

On November 15, 1990, Garcia's jury trial commenced. The trial lasted five months. Approximately 90 witnesses testified, including former codefendants Jackson and Countryman who, pursuant to a plea agreement, testified against Garcia. Garcia argued at trial that he was being prosecuted in retaliation for filing a successful discrimination suit against the DEA, and that all monies discovered in his Swiss bank account were not acquired through narcotics trafficking, but through jewelry smuggling and "under karating," offenses not charged in the indictment and not extraditable under the treaty with Luxembourg. The jury did not believe Garcia's story. He was convicted on Counts 1 through 5.[2]

On July 22, 1991, Garcia was sentenced consecutively on all 5 counts to a pre-guidelines sentence of 80 years, and a fine of $1,160,000.

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[2] Count 6 was dismissed pursuant to the district court's granting of Garcia's Fed.R.Crim.P. 29 motion.

III.

THE ISSUES ON APPEAL

Garcia makes five arguments on appeal: (a) that it was error to refuse to give a jury instruction on how to weigh evidence of commingled funds in connection with the money laundering charges, (b) that it was error to refuse a requested instruction on the Government's alleged failure to collect and preserve potentially exculpatory evidence, (c) that it was error to allow the Government to present Garcia's foreign bank records as evidence, (d) that it was error to correct the sentence pursuant to Fed.R.Crim.P. 35, and (e) that it was error to sentence him under the conspiracy conviction to 15 years because the jury rendered a general verdict.

A. *The Commingling of Funds Instruction*

Garcia contends that the district court erred when it refused to instruct the jury on how to evaluate proceeds from a commingled bank account under the money laundering charges. We disagree.

Garcia was charged in Counts 4 and 5 with money laundering under 18 U.S.C. §§ 1956(a)(1)(B)(i) and (a)(2)(B)(i). The indictment stated that he had transferred $420,000 from his Swiss bank account to his account in Santa Monica and that the transferred money was proceeds from illegal narcotics transactions. The statute states in pertinent part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity,

> conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
>
> (B) knowing that the transaction is designed in whole or in part –
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity
>
> (2) Whoever transports, transmits, or transfers, or attempts to transport, transmit or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States –
>
> (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part – (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity. . . .
>
> shall be sentenced to a fine . . . or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956 (1992 Supp.)

The undisputed evidence at trial revealed that on May 21, 1987, Garcia transferred $420,000 from a Swiss bank account to the Santa Monica Bank, and then on May 28, 1987, used that money towards the purchase of a $581,600 home in Palos Verdes, California. Prior to the

wire transfer, the Swiss account contained approximately $1,700,000.

The Government contended that the $420,000 were proceeds from Garcia's narcotics trafficking. The Government presented evidence that approximately $1,483,165 of the funds in the Swiss account were receipts from the sale of stolen drugs. The evidence was supported by the testimony of coconspirators Countryman and Jackson, who testified regarding 13 separate thefts of drugs and monies from DEA vaults and from DEA-targeted narcotics traffickers that they and Garcia participated in over a six-year period. The Government produced evidence that Garcia attempted to conceal the source of the funds to purchase the house by creating fictitious loan documents purporting to show that the funds were borrowed from an Italian citizen named DiUbaldo instead of coming from his Swiss bank account. Mr. DiUbaldo testified that he never loaned Garcia any money.

Garcia's defense to the money laundering charges was that the money in the Swiss account was not proceeds from drug trafficking, but rather, it was the proceeds of jewelry smuggling, a crime with which he was not charged. Garcia presented a detailed account of several trips to Italy where he would pick up hundreds of kilograms of gold jewelry for a company named Oro Aurora and smuggle it into the United States. Garcia's expert testified that from 1983 to 1987 Garcia would have received approximately $2,000,000 from his jewelry smuggling. Based on this testimony, Garcia claimed that all of the money in the Swiss account was derived from jewelry smuggling, not narcotics trafficking.

Both parties submitted proposed jury instructions regarding how to evaluate the proceeds from the Swiss bank account that had been transferred to the Santa Monica Bank. The district court refused to give an instruction on commingling of the funds, ruling that it was an issue of fact for the jury to decide whether Garcia's withdrawal of $420,000 represented the proceeds of drug trafficking in violation of section 1956.

"We review the district court's determination whether there was a factual basis for giving an instruction for an abuse of discretion and review related issues of law *de novo*." *United States v. Taren-Palma*, 997 F.2d 525, 530 (9th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1648, 128 L.Ed.2d 368 (1994). Garcia's contention is a factual issue. Thus, we review for abuse of discretion.

Garcia claims that the district court misstated the elements of the money laundering offenses because it failed to instruct the jury that the Government had the burden to prove that the money had been specifically derived from drug trafficking. We have held that "[s]o long as the [jury] instructions fairly and adequately cover the issues presented, the judge's formulation of those instructions or choice of language is a matter of discretion." *United States v. Lopez*, 885 F.2d 1428, 1434 (9th Cir.1989), *cert. denied*, 493 U.S. 1032, 110 S.Ct. 748, 107 L.Ed.2d 765 (1990) (citation omitted). Thus, as long as the instructions fairly presented the elements of the money laundering statute, there was no error.

The court's jury instructions for Counts 4 and 5 were:

Count 4

[T]he government must prove each of the following elements beyond a reasonable doubt:

First, the defendant caused money to be transported from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States.

Second, the defendant knew that the money represented the proceeds of the felonious buying, selling or dealing of narcotic or other dangerous drugs.

Third, the defendant knew the transportation was designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of drug proceeds.

Count 5

[T]he government must prove each of the following elements beyond a reasonable doubt:

First, the defendant conducted a financial transaction involving property that represented the proceeds of the felonious buying, selling or dealing of narcotic or other dangerous drugs.

Second, the defendant knew that the property represented the proceeds of the felonious buying, selling or dealing of narcotic or other dangerous drugs.

Third, the defendant knew the transaction was designed in whole or in part to conceal or

> disguise the nature, location, source, ownership or control of drug proceeds.

These instructions adequately establish the elements of the offenses and that the Government had the burden to prove that the $420,000 at issue had been derived from drug trafficking. Garcia, however, contends that the Government had to meet a higher standard by proving that all the money used in the transaction came specifically from drug proceeds, not from untainted funds commingled in the Swiss bank account.

This circuit has yet to address the "proceeds" requirement of section 1956 or the money laundering statutes. Other circuits have addressed the issue. The Eighth Circuit does not read the statute to require that the Government trace the proceeds to a particular sale. *United States v. Blackman*, 904 F.2d 1250, 1257 (8th Cir.1990). The Tenth Circuit, in addressing the "proceeds" requirement of section 1567, a companion money laundering statute, stated:

> The government had the burden of showing that the criminally derived property used in the monetary transactions was in fact derived from specified unlawful activity. This does not mean, however, that the government had to show that funds withdrawn from the defendant's account could not possibly have come from any source other than the unlawful activity. Once proceeds of unlawful activity have been deposited in a financial institution and have been credited to an account, those funds cannot be traced to any particular transaction and cannot be distinguished from any other funds deposited in the

> account. The "tainted" funds may be commingled with "untainted" funds. . . . *[R]equiring a showing that the proceeds were in fact "derived from specified unlawful activity" could not have been intended as a requirement that the government prove that no "untainted" funds were deposited along with the unlawful proceeds. Such an interpretation would allow individuals to avoid prosecution simply by commingling legitimate funds with proceeds of crime. This would defeat the very purpose of the money-laundering statutes.*

United States v. Johnson, 971 F.2d 562, 570 (10th Cir.1992), (internal citation omitted) (emphasis added).

The Seventh Circuit has interpreted the proceeds element to require that the Government prove that the transaction "involves" the proceeds of narcotics trafficking, and that "involves" means something less than all. *United States v. Jackson*, 983 F.2d 757, 765 (7th Cir.1993). The Seventh Circuit has further held that a jury instruction stating that all the proceeds must be derived from drug activity is not required because section "(a)(1)(B)(i) allow[s] for convictions where the funds involved in the transaction are derived *only in part* from 'specified unlawful activities.' " *Id.* at 768 (citing *United States v. Jackson*, 935 F.2d 832, 840 (7th Cir.1991)). The Seventh Circuit has observed, and we agree, that Congress, in drafting the money laundering statutes, did not intend for defendants to be able to avoid the sanction of the statute by commingling funds. *Jackson*, 935 F.2d at 840.

Garcia urges the adoption of a rule that would identify whether tainted and untainted funds were withdrawn on a "drugs in – first out," a "drugs in – last out," or an averaging basis. He relies on forfeiture law and case

law developed under 18 U.S.C. § 2314. These cases are inapposite.

We conclude that under the money laundering statutes, due to the fungibility of money, it is sufficient to prove that the funds in question came from an account in which tainted proceeds were commingled with other funds. As the Tenth Circuit noted, to rule otherwise would defeat the very purpose of the money laundering statutes. It is unnecessary to attempt to segregate in some manner the tainted funds from the commingled account. Although a special instruction on the effect of commingling could have been given, it was unnecessary. The instructions, as given, were adequate. Thus, whether there were tainted funds in a commingled account is the issue of fact for the jury to decide. No special commingling instruction is necessary as long as the elements of the money laundering offense and the burdens of proof are properly instructed.

In this case, the Government presented evidence that nearly all the money in Garcia's Swiss bank account was derived from narcotics transactions. Garcia presented evidence that the money in his Swiss account came from jewelry smuggling, not narcotics transactions. The source of funds in that account was an issue of fact for the jury to decide, based on the witnesses' testimony and credibility. "It is the jury's duty to weigh the evidence and determine what version of the facts to believe." *United States v. Toomey*, 764 F.2d 678, 681 (9th Cir.1985), *cert. denied*, 474 U.S. 1069, 106 S.Ct. 828, 88 L.Ed.2d 799 (1986).

The district court properly instructed the jury on the elements of section 1956 and on how to weigh the evidence. The district court did not abuse its discretion when it refused to instruct the jury on how to proportion the proceeds between tainted and untainted funds. The presence of some tainted funds in the commingled account is sufficient to taint the $420,000 wired from his Swiss account to Santa Monica to buy the house.

B. *Instruction on Failure to Preserve Evidence*

Garcia claims that it was error to refuse to give an instruction concerning his contention that the Government failed to preserve and collect evidence regarding his participation in gold jewelry smuggling. He contends that this constituted a failure to instruct on his theory of defense. Garcia's proposed jury instruction stated:

> You have heard evidence that the government failed to collect potentially exculpatory evidence concerning the nature and extent of the gold smuggling activities of Piero Saltarelli and Darnell Garcia. If you find that the government, or agents of the government then conducting the investigation, failed to collect this evidence in bad faith or because one or more of the agents harbored animosity towards Darnell Garcia, then you may infer that the evidence not collected by the government was likely to support Mr. Garcia's defense.

It is a well-founded proposition in this circuit that a defendant is entitled to have a judge "instruct the jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence." *United*

States v. Mason, 902 F.2d 1434, 1438 (9th Cir. 1990). However, the proposed instruction did not set forth a theory of defense. It did not provide the requisites of a legal defense to the offense charged. *See United States v. Yarbrough*, 852 F.2d 1522, 1541 (9th Cir.), *cert. denied*, 488 U.S. 866, 109 S.Ct. 171, 102 L.Ed.2d 140 (1988). Rather, the proposed instruction relates only to a permissible inference that may be drawn if certain facts are found to be true.

Garcia contends that the Government acted in bad faith because it failed to collect the business records from his alleged business partner, Piero Saltarelli. A failure to collect potentially exculpatory evidence can constitute a violation of the due process clause only if bad faith is shown. *Miller v. Vasquez*, 868 F.2d 1116, 1119-20 (9th Cir. 1989), *cert. denied*, 499 U.S. 963, 111 S.Ct. 1591, 113 L.Ed.2d 654 (1991). *See also Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 337-38, 102 L.Ed.2d 281 (1988). Garcia contends that the court erred because it did not allow him to present the full details of his successful discrimination suit against the DEA; and thus, to show the DEA's bias and bad faith in failing to collect the allegedly exculpatory evidence. The discrimination suit had marginal, if any, relevance to the bad faith contention. The court did permit testimony regarding the discrimination suit, but did not allow the specific details. This limitation was not an abuse of discretion.

There is no evidence that the government intentionally neglected to obtain evidence concerning Garcia's involvement with Saltarelli. The Government travelled to Italy several times to interview Saltarelli. Both parties deposed Saltarelli. The Government attempted numerous

times to obtain the records from the gold business. There was no evidence of bad faith justifying the defendant's proposed instruction; and thus, the district court did not err when it refused to submit the instruction to the jury.

C. *The Swiss Bank Records*

Garcia contends that the district court should have applied the doctrine of judicial estoppel to preclude the Government from using his Swiss Bank records as evidence in support of the money laundering offenses. These records were obtained through the United States-Switzerland Mutual Assistance in Criminal Matters Treaty ("Treaty"). Garcia concedes that under the Treaty a defendant has no standing to challenge an erroneous use of Swiss banking records. He argues, however, that estoppel should apply because the Government took inconsistent positions in the district court regarding the use to be made of the records. The district judge, to whom all representations by the Government were made, found this not to be the case.

The doctrine of judicial estoppel is invoked to preclude a party from abusing the judicial process by taking inconsistent positions in the same litigation. *Yanez v. United States*, 989 F.2d 323, 326 (9th Cir.1993) (citation omitted). A court invokes judicial estoppel at its discretion. *Id.* Thus, we review for an abuse of discretion.

There are two varying views in the circuit courts regarding judicial estoppel. This circuit has not, as yet, adopted either the majority or minority view of judicial estoppel. *Id.*

We recently reiterated the two views of judicial estoppel as follows:

> Under the majority view, judicial estoppel does not apply unless the assertion inconsistent with the claim made in the subsequent litigation "was adopted in some manner by the court in the prior litigation." Under the minority view, judicial estoppel can apply even when a party was unsuccessful in asserting its position in the prior judicial proceeding, "if the court determines that the alleged offending party engaged in 'fast and loose' behavior which undermined the integrity of the court."

Britton v. Co-op Banking Group, 4 F.3d 742, 744 (9th Cir.1993) (quoting *In re Corey*, 892 F.2d 829, 836 (9th Cir.1989)). We hold that under either the majority or the minority view judicial estoppel does not apply to this case.

Prior to the indictment, the Government made a request to the Swiss government to provide bank records for the criminal investigation of the defendant and others. The formal Request for Assistance under the Treaty requested the records to show "deposits and withdrawals from Swiss accounts" by persons who were suspected of, among other things, "trafficking in cocaine and heroin" and "laundering the proceeds of drug trafficking through Switzerland and elsewhere." The Request for Assistance also referenced the particular $420,000 transfer to purchase a home in California. Garcia filed a motion for an order directing the Government to withdraw its Request for Assistance. In the motion, Garcia did not contend that the Government's use of the records would be improper to prove money laundering charges, but he

argued that under the Treaty, the use would be improper to prove income tax and currency reporting violations.

In interpreting the Swiss response to the Request for Assistance in these preliminary proceedings, Richard Owens, then the Associate Director for the Office of International Affairs of the Department of Justice, stated that the Swiss records:

> may not be used by the United States government for any matter "concerning violations with respect to taxes, customs duties, . . . or exchange control regulations. . . . " Treaty, Article 2(1)(c)(5). This does not preclude such use in a prosecution involving the financing of drug trafficking.

Garcia relies on Owens' statement and asserts that at trial the bank records were used to show the transfer of funds to purchase a house, not to demonstrate evidence of financing from drug trafficking. He contends that the proof was inconsistent with Owens' interpretation; thus, judicial estoppel should be invoked to prevent the Government from relying on the Swiss account records.

The records were not used with respect to taxes, customs duties, or exchange control regulations, which is consistent with Owens' representation. His statement that this did not preclude their use in prosecution involving the financing of drug trafficking was not a representation that they would not be used to prove money laundering charges. Furthermore, the "financing of drug trafficking" can reasonably be interpreted as including the necessity to launder the funds. The district court stated that Garcia's argument was "somewhat semantic" and found that

judicial estoppel was not appropriate. We conclude that this was not an abuse of discretion.

D. *The Correction of the Sentence*

Garcia contends that the district court erred when, pursuant to Fed.R.Crim.P. 35(a), it changed the applicable parole eligibility statute from 18 U.S.C. § 4205(a) to § 4205(b)(1). We agree.

The legality of a criminal sentence is reviewed *de novo. United States v. Koenig,* 813 F.2d 1044, 1046 (9th Cir.1987). Garcia was sentenced to a total of 80 years. At sentencing the judge stated, "All of these sentences of incarceration shall be pursuant to 18 United States Code Section 4205(a). And you shall be eligible for a parole hearing after *having served one-third of the time.*"

The written judgment, filed the next day, stated: "The sentences on each count shall run consecutively to each other, and the defendant shall be considered for parole pursuant to 18 U.S.C. § 4205(a)."

Section 4205(a) states:

> (a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

18 U.S.C. § 4205(a) (1988). The district court's oral pronouncement of Garcia's sentence is inconsistent with section 4205(a). The court stated that Garcia would serve

one-third of his sentence of 80 years, which would be approximately 26 years and 6 months, whereas section 4205(a) would require Garcia to serve only 10 years before he would be eligible for parole.

Based on this inconsistency, the Government filed a motion to correct an illegal sentence pursuant to Fed.R.Crim.P. 35(a). At the hearing, the judge stated that at sentencing "I made it very clear that I thought this defendant should serve one-third of the time that he had been sentenced to which was 80 years in the aggregate. . . . I meant the sentence to be pursuant to 18 United States Code Section 4205(b)(1)." Section 4205(b)(1) states that the court may:

> (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed. . . .

18 U.S.C. § 4205(b)(1) (1988). The court corrected what it considered an illegal sentence and stated, "Whether that will stand up on appeal I don't know. But clearly that was the intention of this court. I misspoke; and pursuant to Rule 35(a), I'm making that correction now to what otherwise would be an illegal sentence." We hold that the district court erred in correcting the sentence under Rule 35, and we remand for sentencing.

Under Fed.R.Crim.P. 35(a)[3] the district court may correct a sentence if it is illegally imposed. *United States v. Stevens*, 548 F.2d 1360, 1362 (9th Cir.), *cert. denied*, 430 U.S. 975, 97 S.Ct. 1666, 52 L.Ed.2d 369 (1977). A sentence is illegal if it is so ambiguous that it fails to reveal its meaning "with fair certainty." *United States v. Alverson*, 666 F.2d 341, 348 (9th Cir.1982) (citing *United States v. Moss*, 614 F.2d 171, 175, 176 n. 4 (8th Cir.1980)). An oral sentence which leaves uncertainty as to the amount of time to be served is ambiguous but not so ambiguous as to be illegal. *See Payne v. Madigan*, 274 F.2d 702, 704-05 (9th Cir.1960), *aff'd*, 366 U.S. 761, 81 S.Ct. 1670, 6 L.Ed.2d 853 (1961). Garcia's oral sentence is ambiguous as to the time to be served before becoming eligible for parole, but it is not illegal.

Where the oral pronouncement of a defendant's sentence is unambiguous, but differs from the written sentence, the oral sentence controls. *United States v. Hicks*, 997 F.2d 594, 597 (9th Cir.1993). *See also United States v. Bergmann*, 836 F.2d 1220, 1221 (9th Cir.1988). In contrast, the written sentence will control where there are ambiguities in the oral pronouncement of the sentence, and the writing resolves the ambiguity. *Green v. United States*, 447 F.2d 987, 987 (9th Cir.1971), *cert. denied*, 405 U.S. 976, 92 S.Ct. 1201, 31 L.Ed.2d 250 (1972).

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[3] The version of Rule 35(a) applicable to this pre-guideline case states:

> **(a) Correction of a Sentence.** The court may correct an illegal sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

Here, the oral pronouncement is ambiguous regarding whether Garcia's parole eligibility date will be determined under 18 U.S.C. § 4205(b)(1) or under 4205(a). The written judgment clearly states he shall be considered for parole pursuant to 18 U.S.C. § 4205(a). Thus, relying on the written judgment, Garcia's parole eligibility date is clearly and unambiguously determined under section 4205(a), and any attempt to "correct" it violates Garcia's double jeopardy rights.

Even though the district court may have intended at all points in time to apply section 4205(b)(1), it cannot correct a sentence that was imposed to reflect this intention. *See United States v. Munoz-Dela Rosa*, 495 F.2d 253, 255 (9th Cir.1974) (citing with approval *United States v. Sacco*, 367 F.2d 368 (2d Cir.1966)). The district court's later amended judgment increased Garcia's minimum term before being eligible for parole from 10 years to 26 and 2/3 years, in violation of the double jeopardy provisions. *See United States v. Wingender*, 711 F.2d 869, 870 (9th Cir.1983).

In *Munoz-Dela Rosa*, we emphasized the right of a criminal defendant against double jeopardy, stating that the pronouncement of a sentence, even if contrary to the district judge's intent, must control:

> All acknowledge that judges are human and may misstate their intention at the time of sentencing. The instant case presents very strong evidentiary support for a holding that the district court did in fact "misspeak" himself at the time Appellant was sentenced. Yet the difficulties in formulating a principle to establish an

> exception to the well-established rules hereinabove stated have led us to the conclusion that the interests of justice . . . require strict adherence to the axiom that an unambiguous oral pronouncement of a legal sentence must control.

495 F.2d at 256. The same holds true when the written judgment clarifies an ambiguous legal oral sentence.

The Government cites *United States v. Edmonson*, 792 F.2d 1492, 1496 (9th Cir.1986), *cert. denied*, 479 U.S. 1037, 107 S.Ct. 892, 93 L.Ed.2d 844 (1987), as support for its contention that there is no double jeopardy prohibition against correcting an illegal sentence even if correction increases the punishment. *Edmonson* is distinguishable, however, because in that case (consolidating appeals from the decisions of two district judges) the district courts convicted the defendants of substantive crimes different from the crimes charged in the indictments. The sentences were truly illegal. In contrast, the district court in this case had authority to impose a minimum sentence under either section 4205(a) or (b)(1). Thus, the sentence under section 4205(a) (in both its oral and written form) was not "illegal" such that Rule 35(a) could be invoked. Here, regardless of the district judge's intent to apply section 4205(b)(1), Garcia's sentence under the more lenient section 4205(a) controls and should not have been "corrected."

E. *Sentencing Under the Conspiracy Conviction*

Garcia contends he was improperly sentenced in this pre-guidelines case to 15 years under the conspiracy conviction. We agree.

Garcia was convicted under Count 1 of the indictment for conspiracy in violation of 21 U.S.C. § 846. The charge alleged five separate objects of the conspiracy. Four of the objects alleged violations of 21 U.S.C. § 841(a)(1), possession with intent to distribute and distribution of heroin and cocaine. The fifth object of the conspiracy alleged a violation of 21 U.S.C. § 843(b), using communication facilities to facilitate the commission of drug offenses.

The jury returned a general verdict of guilty on the charge. Neither party requested a special verdict form on the multi-object conspiracy. A court sentences the defendant for a section 846 conspiracy conviction based on the penalties established for the object of the conspiracy. *See* 21 U.S.C. § 846. Garcia was sentenced to 15 years. This sentence reflects the substantive narcotics violations named as objects of the conspiracy that carried a maximum 15-year sentence at the time Garcia was sentenced. *See* 21 U.S.C. § 841(a)(1). Garcia contends that the district court erred in sentencing him to 15 years because the general verdict did not state which object of the charged multi-object conspiracy he was found guilty of violating. Therefore, he contends that he should have been sentenced based on the object of the conspiracy that required the lowest period of incarceration, which is 21 U.S.C. § 843(b), using communication facilities to facilitate the commission of drug offenses. This offense carries a four-year sentence.

Generally, when a defendant challenges a conviction based on the absence of a special verdict form, but failed to object to the jury instructions or offer a special verdict, we review for plain error. *See United States v. Vasquez-*

Velasco, 15 F.3d 833, 847 (9th Cir.1994). However, when the information sought in the special verdict is relevant to the sentence to be imposed, it is the duty of the Government to seek a special verdict and we will review the sentence *de novo*. *See id.* at n. 11; *United States v. Orozco-Prada*, 732 F.2d 1076, 1084 (2d Cir.), *cert. denied*, 469 U.S. 845, 105 S.Ct. 154, 83 L.Ed.2d 92 (1984); *Brown v. United States*, 299 F.2d 438 (D.C.Cir.), *cert. denied*, 370 U.S. 946, 82 S.Ct. 1593, 8 L.Ed.2d 812 (1962); *but see Williams v. United States*, 238 F.2d 215, 219 (5th Cir.1956), *cert. denied*, 352 U.S. 1024, 77 S.Ct. 589, 1 L.Ed.2d 596 (1957). Because the Government sought to establish the conspiracy to violate section 841(a)(1), a crime that bore the longer sentence, it was the obligation of the Government to submit a special verdict form to substantiate the charge. Thus, we will review Garcia's sentence under the conspiracy *de novo*.

An element of the crime of conspiracy under section 846 is that the conspiracy must be to commit an offense under the Drug Abuse Prevention and Control subchapter. If the jury finds no such object of the conspiracy, there is no crime. In this case, the sentencing judge was confronted with two objects of the alleged conspiracy, two different elements, which called for two very different sentences. If the conspiracy was only to violate section 843(b), it is a crime punishable by a maximum sentence of four years; however, if it was to violate section 841(a)(1), it is a crime punishable by a maximum sentence of 15 years. In the absence of a special verdict, there was no way for the sentencing judge to know which object was the necessary element to constitute the crime. Thus, the verdict does not justify a 15-year sentence. *See Orozco-Prada*, 732 F.2d at 1083-84; *Newman v. United States*, 817

F.2d 635, 637 (10th Cir.1987); *United States v. Owens*, 904 F.2d 411, 415 (8th Cir.1990); *Brown*, 299 F.2d at 439-40; *United States v. Quicksey*, 525 F.2d 337, 341 (4th Cir.1975), *cert. denied*, 423 U.S 1087, 96 S.Ct. 878, 47 L.Ed.2d 97 (1976).

Garcia's jury was charged with determining whether he was guilty of conspiring to commit the narcotics charges *or* whether he was guilty of conspiring to use communication facilities to facilitate the commission of drug offenses. There was sufficient evidence presented to convict Garcia under either of the listed objects or both. But because there was no special verdict form provided, we only know that the jury found Garcia guilty of conspiring to violate section 841(a)(1), or of conspiring to violate section 843(b), or both. The sentencing court cannot speculate as to which object of the conspiracy the jury found to support the conviction. To do so would invade the province of the jury.

As we recently discussed in *United States v. Gaudin*, 28 F.3d 943 (9th Cir.1994) (en banc), it is clear that the jury must decide all facts necessary to establish each element of the crime. *Gaudin*, at 946.

> What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements.

Id. at 946 (quoting *Sullivan v. Louisiana*, ___ U.S. ___, ___, 113 S.Ct. 2078, 2080-81, 124 L.Ed.2d 182 (1991)). We

emphasized the importance of this right in quoting Justice Scalia's concurring opinion in *Carella v. California*, 491 U.S. 263, 268, 109 S.Ct. 2419, 2422, 105 L.Ed.2d 218 (1989).

> The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." It is a structural guarantee that "reflect[s] a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State.

Gaudin, at 946-47.

The Government relies on *United States v. Dennis*, 786 F.2d 1029 (11th Cir.1986), *cert. denied*, 481 U.S. 1037, 107 S.Ct. 1973, 95 L.Ed.2d 814 (1987), and *United States v. Peters*, 617 F.2d 503 (7th Cir.1980), as support for its contention that Garcia's sentence under the conspiracy can stand because he was convicted of a substantive narcotics violation which was also listed as an object of the conspiracy. This would allow the court to infer that a conviction of the substantive offense also means a conviction of conspiracy to engage in the same offense listed as an object of the conspiracy. Conviction of the substantive offense no doubt creates a strong inference that the substantive offense was an object of the conspiracy, but it is

not equivalent to a *finding* by the jury of that element of the crime.[4]

Other circuits in analogous circumstances have withheld judgment on the conspiracy count for 30 days, giving the Government the right to resentence under the charge with the lesser penalty, in lieu of a new trial. *See Brown*, 299 F.2d at 440; *Orozco-Prada*, 732 F.2d at 1084; *Quicksey*, 525 F.2d at 341; *Owens*, 904 F.2d at 414-15; *U.S. v. Pace*, 981 F.2d 1123, 1123 (10th Cir. 1992). We will do the same. If the Government consents to a resentencing under 21 U.S.C. § 843(b), we will affirm the conviction on the conspiracy count and remand for resentencing. If the Government does not consent we will vacate Garcia's sentence on Count 1 and remand for a new trial on that count.

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[4] We note that the sentencing guidelines in section 1B1.2(d) (n. 5) state that when the verdict in a multi-object conspiracy does not establish which offense was the object of the conspiracy, the court is to decide the object of the conspiracy. The note specifies that the court can do so "if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense."

The case at hand is a pre-guidelines case, but we acknowledge that the rationale of this holding casts doubt on the constitutionality of that provision of the sentencing guidelines, because that provision permits a judge rather than the jury to find the facts necessary to establish an element of the crime. The submission of a special verdict form would forestall any such issue.

IV.

CONCLUSION

Garcia's conviction is affirmed. The case is remanded for resentencing consistent with the opinion. In the event the Government does not consent to resentencing under section 843(b), the district court is instructed to vacate the sentence for Count 1 and grant a new trial on that charge.

AFFIRMED in Part, and REMANDED.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DARNELL GARCIA, Defendant-Appellant.	No. 91-50642 D.C. No. CR 88-983-TJH (Filed Dec. 5, 1994) ORDER

Appeal from the United States District Court
for the Central District of California

Before: HUG, SCHROEDER, and FERGUSON, Circuit Judges.

The panel, as constituted in the above case, has voted to deny appellant's petition for rehearing. Judge Hug and Judge Schroeder have voted to reject the suggestion for rehearing en banc, and Judge Ferguson has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on whether to rehear the matter en banc.

Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-50642
CT/AG#: CR-88-0983-TJH-01

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

DARNELL GARCIA

Defendant – Appellant

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART, AND REMANDED.

Filed and entered November 22, 1994.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

91-50642

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DARNELL GARCIA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California
No. CR 88-983-TJH

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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STATEMENT OF COUNSEL

Appellant Darnell Garcia hereby petitions the panel for rehearing and also suggests that the full Court hear the portion of the panel's opinion concerning money laundering *en banc*. The panel decision, reported in Section III-A of the opinion, 94 D.A.R. 13968 at 13969-71, rejected requiring a jury instruction relating to money commingled in a bank account and impermissibly created

an irrebuttable presumption, or relieved prosecutors of their constitutional obligation to prove, a critical element of a money laundering offense, namely that money transferred from the account "in fact involves" the proceeds of an illegal activity. By declaring that unlawful proceeds are *always* transferred from an account commingled with both drug and non-drug proceeds, the panel simply eliminated the need for the jury to determine whether illegal proceeds were transferred. The decision goes well beyond any reported case by holding, in effect, that even if one penny of alleged drug funds is deposited into an account with millions of otherwise "clean" dollars, a transfer of any amount from the commingled account *always* satisfies the statutory requirement in 18 U.S.C. § 1956(a)(1)(B)(i) that the transfer "in fact involves" the proceeds of an unlawful activity.

The panel opinion also rejected as "inapposite" but without any analysis, appellate decisions interpreting the only arguably analogous statute dealing with commingling. Under the statute, 18 U.S.C. § 2314, prosecutors are routinely required to prove that the transfer actually involved stolen funds, by showing that the transfer was for more money than the amount of lawful funds in the account, thereby assuring at least some of the transferred money included tainted funds.

Finally, the opinion assumes an intention on Congress's behalf without any support and seems to be motivated by a desire to assist prosecutors when the alleged transfer comes from an account with commingled funds. But a construction which furthers Congressional intent and does no violence to Mr. Garcia's rights can co-exist merely by providing a jury with an instruction which

requires a finding that the transfer included some amount of tainted funds. Alternatively, prosecutors can rely on the companion to section 1956 which is not limited to the transfer of money from an account but provides substantial penalties for, *inter alia*, the deposit, exchange or use of criminally derived proceeds. In any event, the interpretation of the statute advanced by Mr. Garcia limits section 1956 to its express terms and does not deprive prosecutors of a potent weapon against different variants of money laundering.

I. THE PANEL'S OPINION IMPERMISSIBLY ESTABLISHES AN IRREBUTTABLE, MANDATORY PRESUMPTION WHICH RELIEVES THE GOVERNMENT OF ITS BURDEN OF PROOF ON AN ELEMENT OF THE OFFENSE.

At trial, both the prosecution and the defense acknowledged the jury could conclude that the Swiss bank account from which $420,000 was transferred contained both money arguably from drug sources and money obtained from non-drug sources. Both sides recognized that if the jury believed the account contained, as a factual matter, funds generated from a drug and a non-drug source, the jury required further instruction in order to determine whether the **transferred** money "in fact" involved the proceeds of a drug transaction. Clerk's Record 518, 520; Excerpts of Record 312, 318.[1] The trial

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[1] 18 U.S.C. § 1956(a)(2)(B)(i), on which count 4 of the Amended Third Superseding Indictment was based, requires a transfer, with knowledge that the funds "involved . . . represent the proceeds" of an unlawful activity. The Indictment charged

judge rejected both proposed formulations for commingled money, but gave the remaining instructions, without any direction to the jury on commingling suggested by the parties. The lower court permitted both sides to argue their legal theories concerning commingled funds to the jury.[2]

The panel opinion affirmed. It declared the controversy "a factual issue," 94 D.A.R. at 13969, thereby relegating the dispute to review for abuse of discretion; mischaracterized Mr. Garcia's position as one requiring the government to prove that **all** of the transferred money came from drug proceeds, 94 D.A.R. at 13970; ignored the only analogous authority on the issue of the transfer of commingled funds as "inapposite, *id.*; and divined a Congressional intent, not from anything in the statements or conduct of Congress, but from the perceived difficulty

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Mr. Garcia knew the "funds involved . . . represented the proceeds" of an illegal activity transfer and "in fact involved the proceeds" of a drug transaction, 18 U.S.C. § 1956(a)(1)(B)(i), on which count 5 was based, requires knowledge that the property involved, here money to buy a house, "represents the proceeds" of an unlawful activity and "in fact involves the proceeds" of unlawful activity. Count 5 charged Mr. Garcia knew money for the house purchase "represented the proceeds" of unlawful activity and "in fact involved the proceeds" of a drug transaction.

[2] Mr. Garcia's counsel argued that so long as at least $420,000 of non-drug proceeds were in the account, the jury could not find beyond a reasonable doubt that the transferred money "in fact involved" drug proceeds. The government argued the converse – so long as $420,000 of drug proceeds were in the account, the jury could convict. *See* Opening Brief at 22-23; Defendant's Reply Brief at 6-8.

which Mr. Garcia's position might cause prosecutors in their pursuit of suspected money launderers. *Id.*

But the panels' most unpalatable flaw stemmed from its legal conclusion that "the presence of some tainted funds in the commingled account," presumably in any amount, was sufficient to taint the $420,000 actually transferred. 94 D.A.R. at 13871. Thus, even though the statute and the indictment, on their face, require the jury to find that the transfer "represents the proceeds" of an unlawful activity, and "in fact, involves the proceeds" of a drug transaction, the panel explained the jury may conclusively presume the transfer "in fact, involves" drug proceeds so long as one penny of alleged drug money was in the account at the time of the transfer. The decision either relieved the government of its burden to prove an essential element of the money laundering statute – a money transfer which "represents the proceeds" and "in fact, involves" the proceeds of a drug transaction in violation of the rule of *In re Winship*, 397 U.S. 358, 364 (1970) (conviction must be based upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged), or creates an irrebuttable presumption in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979) (jury instruction that "law presumes that a person intends the ordinary consequences of his voluntary acts" is unconstitutional, whether jury saw instruction as conclusive presumption or as shifting burden of persuasion, because it violates due process requirement that state prove every element of crime beyond reasonable doubt). *See Martinez v. Borg*, 937 F.2d 422, 423 (9th Cir. 1991) (constitutional error if jury is deprived of instruction on all elements of the offense; defective

instruction can violate requirement that government prove every element beyond a reasonable doubt by effectively allowing government to presume an element of the crime).

The panel's reliance on *United States v. Blackman*, 904 F.2d 1250 (8th Cir. 1990), superseded by regulation on other grounds, *United States v. Rodriguez*, 942 F.2d 899, 902 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 990 (1992); *United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992), and *United States v. Jackson*, 983 F.2d 757 (7th Cir. 1993), is entirely misplaced. Mr. Garcia never contended, as in *Blackman*, that the government had to trace deposited money to a particular drug transaction. Nor did he argue that the government had to prove "no 'untainted' funds were deposited along with the unlawful proceeds." *United States v. Johnson*, 971 F.2d at 570. Neither party at trial raised the *Jackson* issue concerning whether the statute requires proof that all of the transferred proceeds involved drugs or whether " 'involves' means something less than all," 94 D.A.R. at 13970, perhaps because *Jackson* was decided two years after the trial here. In any event, *Jackson* does not reach the issue presented by the instructions proposed by both the prosecution and defense concerning how the jury should apply to commingled funds the statutory requirement that the transfer "represent the proceeds" and "in fact, involves" drug money. Whether all $420,000 had to "involve" drug money or only $1 had to "involve" drug proceeds, the jury remained unguided regarding how to determine if **any** drug funds were, in fact, transferred from Switzerland to Santa Monica.

The panel's erroneous conclusion results in part from its stretch to find that Mr. Garcia's complaint is solely

factual. Undoubtedly, just as the panel noted, whether there was commingled money in the Swiss account is a question of fact for the jury. 94 D.A.R. at 13971. However, both parties assumed the jury might well find the money in the account was commingled.[3] Both sides believed the jury required further legal guidance if it determined both drug and non-drug money were commingled in one account. Since evidence was admitted which presented the commingling issue, Mr. Garcia was entitled to have the jury's deliberation guided by an instruction on the law. Indeed, the panel recognized this principle of law in another section of its opinion. *See* 94 D.A.R. 13971, *citing United States v. Mason*, 902 F.2d 1434 (9th Cir. 1990). *See also United States v. Caldwell*, 989 F.2d 1056, 1060-61 (9th Cir. 1993) (failing to instruct jurors on essential element of a crime is constitutional error because it permits them to convict without finding defendant guilty of that element).[4]

An instruction explaining the effect of commingling on the prosecution's burden of proof is necessary precisely because money is fungible, a fact well known to

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[3] Mr. Garcia presented evidence that approximately $2 million in the account was non-drug money.

[4] Plainly the panel labeled the controversy as one involving a factual basis for the instruction, in order to permit review under the abuse of discretion standard. *See United States v. Taren-Palma*, 997 F.2d 525, 530 (9th Cir. 1993). Here, however, the factual basis for the instruction is undisputed by the parties. Both acknowledged the jury could have found, based on the evidence, commingled funds in the account in question. The question presented on appeal is purely legal in light of the undisputed factual predicate. Review should have been *de novo*.

Congress and anyone else who maintains a bank account. In the absence of an instruction, the jury, after determining the account was commingled, may **assume** the transferred $420,000 contained some or all of the deposited drug funds, thereby unknowingly applying the "drugs in, first out" rule mentioned in several civil forfeiture decisions and advanced at trial by the prosecution's proposed jury instruction. The jury might instead **assume** that since the account contained both kinds of money, some portion of the transferred money probably contained drug money.

The statute and the indictment required much more than an assumption that the transferred money was drug money. *See Sandstrom v. Montana*, 442 U.S. 510 (1979). In the absence of an instruction, no amount of argument by counsel could provide legal guidance to jurors once they determined the money was transferred from a commingled account.

The panel expressed disdain for use of any accounting rule to determine if the transfer, in fact, involved drug money, as developed in several civil forfeiture cases. Instead, it obviated any need for such rules by simply declaring that if a jury finds any amount of drug money in an account, it may **assume** some of it was, in fact, transferred. Surely if the jury can indulge in such speculation for purposes of applying a criminal statute, commingling rules should not be required at all in the much less demanding context of civil forfeiture proceedings. The same expedient rule should have developed there so that if any drug money is in a commingled account, the transferred money must be deemed to include drug proceeds. Yet, not even in the forfeiture context have the decisions abandoned the need for proof of an element of

the claim. *See, e.g., United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986) (court identified three different accounting methods government could use to satisfy burden of proof for forfeiture of monies in bank account containing both narcotics-derived monies and untainted monies).

The rule announced by the panel – that any amount of drug money in an account is sufficient to taint a transfer alleged to be in violation of the money laundering statutes, sweeps so broadly that it necessarily criminalizes conduct which would never constitute a violation of the money laundering statutes. For example, if a defendant maintained two accounts at the same bank, one with drug money and one with non-drug funds, and the defendant transferred money only from the account with non-drug money, no one would contend that the transfer "represents the proceeds" or "in fact, involves" drug proceeds. The simple expedient of two accounts at the same bank prevents the commission of the offense.

By the same token, if the two accounts are merged, some of the money remains untainted even if it is commingled with money derived from drug sales. If money is transferred out, the statute and, as in this case, the indictment, still require the jury to find that the transferred money "in fact involves the proceeds" of an illegal activity. Yet, without an instruction, the jury is left to speculation or assumption. In this case, as in a Section 2314 case, the jury could not know if the transferred money "in fact involve[d] drug proceeds" **unless** more money was transferred from the account than the total amount of untainted money deposited in the commingled account.

This obvious basis for establishing culpability lies at the foundation of the identical commingling issue under the statute prohibiting interstate transportation of money acquired by fraud, 18 U.S.C. § 2314. Rather than being "inapposite," as the panel blithely declares, appellate decisions interpreting section 2314 present the same issue; this same solution for commingled funds should apply with equal force to section 1956. *See United States v. Heath*, 970 F.2d 1397, 1403-4 (5th Cir. 1992), *cert. denied*, 23 L. Ed. 2d 265 (1993) (government satisfied its burden of proving that transfers involved fraudulently obtained monies because aggregate amount taken from account of commingled funds exceeded amount of untainted monies available); *United States v. Lennon*, 814 F.2d 185, 188-89 (5th Cir.), *cert. denied*, 484 U.S. 928 (1987) (as long as each check contained at least $5,000 in fraudulently obtained funds [§ 2314's jurisdictional requirement], irrelevant that checks drawn on account also containing untainted monies); *United States v. Poole*, 557 F.2d 531, 535-36 (5th Cir. 1977) (no conviction under § 2314 if sufficient "clean" monies to cover check).

In fact, the appeals court in *United States v. Heath*, 970 F.2d 1397, 1403 (5th Cir. 1992), sought to determine in a commingling context if the government "failed to prove beyond a reasonable doubt that any individual transfer *involved* the proceeds of the illegal deal." (Emphasis added.) That is exactly the same inquiry required under Section 1956 and the same logical method for dealing with commingled money used in *Heath* should be adopted in the money laundering context. Since section 2314 was already analyzed by other courts at the time the money laundering statutes were adopted and was

amended twice in the same legislation which twice amended the money laundering laws, it is reasonable to believe Congress understood how the transfer of funds from a commingled account would be treated and expected that same treatment to apply to transfers from a commingled account. *See Anderson v. United States*, 966 F.2d 487, 491 (9th Cir. 1992) (" '[A]bsent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction.' ") (citation omitted). Moreover, the treatment afforded commingling under section 2314 is the only possible rule which does not unconstitutionally eliminate an element of the offense, namely, that the funds transferred actually "represent the proceeds" and "in fact, involve" the proceeds of a drug transaction.

Finally, Congress never expressly considered the commingled funds questions, although it could have assumed the application of the sensible proof rule contained in appellate decisions interpreting section 2314. Nevertheless, it is folly to discern a Congressional intent to achieve a particular result from the fear that, otherwise, it would be difficult to convict under a specific set of circumstances.[5] *See Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular

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[5] Neither Mr. Garcia nor the government here ever claimed that the mere act of commingling would permit "defendants to be able to avoid the sanction of the statute. . . . " 94 D.A.R. at 13970. The quote is just one more example of the panel's exaggerated approach to the consequence of properly instructing the jury on the effect of commingling on the government's burden to prove each element of the offense beyond a reasonable doubt.

objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume the *whatever* furthers the statute's primary objective must be the law.").

Additionally, prosecutors are not restricted to the precise provisions of the statute selected in this case; if the prosecution cannot prove that the transfer was larger than the total amount of untainted commingled funds, Congress gave them a full array of other provisions to root out unlawful laundering. For example, they could simply use another portion of the money laundering statutes, such as § 1957, which is not limited to the transfer of drug money but criminalizes the deposit or use of "criminally derived proceeds." In any event, commingling must neither ease nor increase the government's burden of proof; it simply requires the jury to consider the fact of commingling in the context of the money laundering statute.

II. REHEARING OR CONSIDERATION EN BANC SHOULD BE GRANTED.

Rule 40(a) of the Federal Rules of Appellate Procedure requires a petition for rehearing to "state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended. . . . " In the instant case, the panel's opinion contains "misapprehensions" of both the government's and appellant's arguments on appeal, and may have "overlooked" the unconstitutional consequence of its holding. For these reasons, Mr. Garcia's petition should be granted.

Both parties on appeal acknowledged that the jury could find the account contained commingled funds. Mr. Garcia never argued to the jury that the government had to prove the transferred money consisted *solely* of tainted funds. Rather, the issue concerned what instruction should be provided to the jury to guide it in its determination of whether the transfer of commingled funds did "in fact, involve[ ] the proceeds" of a drug transaction. From this narrow issue, the panel created an unconstitutional presumption that so long as an account contains as little as a penny of "tainted" money, a transfer from that account "in fact involves" the proceeds of a drug transaction. Not even the government adopted this radical approach in its argument to the jury.

If the panel's holding is permitted to stand, it could have profound implications for all cases involving transfers from accounts with commingled funds. Because of the importance of this issue, Mr. Garcia suggests the Ninth Circuit hear the proceeding *en banc*. Although *en banc* courts are rarely called, the Supreme Court held they should be convened "when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960). *En banc* determinations in these circumstances, the Court continued, will ensure that no intracircuit conflicts will arise and will promote finality of decision. *Id.* These considerations are not to be given short shrift as " 'in our federal judicial system these courts are the courts of last resort in the run of ordinary cases.' " *Id.* (citation omitted). The unconstitutional effect of the panel's holding presents an

extraordinary circumstance which should be resolved by *en banc* consideration.

CONCLUSION

The panel's failure to review the jury instruction issue de novo and its determination that it was not an abuse of discretion to fail to give the requested instruction relating to the commingling question, consistent with both the statute and the indictment, was clearly wrong. The panel should rehear the section of its decision regarding money laundering; alternatively, the full court should hear the issue *en banc*.

Dated: October 18, 1994

Respectfully submitted,

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18 U.S.C. § 1956

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –

* * *

(B) knowing that the transaction is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . .

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States –

* * *

(B) knowing that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . .

shall be sentenced to a fine . . . or imprisonment for not more than twenty years, or both.